Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT A. LEVY AND PHYLLIS B. LEVY,

Petitioners,

vs.

WILLIAM A. ENGLUND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Arizona Court of Appeals, in an unpublished and uncitable thirty-five page memorandum decision, in multiple instances disregarded and overruled established law in Arizona, relied on numerous misstatements and omissions of material fact to affirm an invalid judgment for attorneys' fees as sanctions by a judge pro tempore sympathetic to counsel for respondent, and awarded attorneys' fees on appeal as sanctions against petitioners who prevailed on appeal. It turned a blind eye to witness tampering by counsel for respondent and denied petitioners' motions to supplement the record, to refer to other appeals court cases, and for oral argument, and affirmed the denial of petitioners' due process claims and their request for change of judge, thereby wrongfully destroying elderly petitioners' personal reputations and depriving them of more than $200,000 saved for their old age.

The question presented is whether the courts of Arizona violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert A. and Phyllis B. Levy (the Levys) respectfully request that a writ of certiorari be issued to review the Memorandum Decision of the Court of Appeals of the State of Arizona in this case.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Memorandum Decision of the Court of Appeals of Arizona is unpublished (App. 1-36). The findings of fact, conclusions of law, and judgment of the Superior Court of Maricopa County is unpublished (App. 39-58).

STATEMENT OF JURISDICTION

The Memorandum Decision of the Court of Appeals of Arizona was entered on July 23, 2009 (App. 1). Motions for Reconsideration in the Court of Appeals were denied on September 4, 2009 (App. 37-38). The Supreme Court of Arizona denied the Levys' timely filed cross-petition for review on January 5, 2010 (App. 61).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

– U.S. CONST., amend. XIV, § 1.

SPECIFICATION WHERE FEDERAL QUESTION WAS RAISED

The question of the adequacy of the hearing procedure was initially raised in the Levys' motion for new trial and amended motion for new trial (App. 62-80). The superior court denied the motion without comment (App. 60). The Levys raised this question again in their opening brief. The Memorandum Decision of the Court of Appeals, at ¶¶57-60 (App. 29-31) rejected these procedural due process arguments and affirmed the denial of the Levys' amended motion for new trial at ¶69 (App. 35). The Levys again raised these issues in their cross-petition for review in the Supreme Court of Arizona. The Levys attacked the attorneys' fees as sanctions imposed by the Court of Appeals by showing their discriminatory nature in their motion for reconsideration in the Court of Appeals and in their cross-petition in the Supreme Court of Arizona. The Levys attacked the discriminatory nature of an unpublished opinion in their motion to publish the memorandum decision in their first appeal *Levy v. Englund (Levy I)*, 1 CA-CV 04-0161 (2005) and in their petition for review in the

Arizona Supreme Court in *Levy I* which was denied on February 7, 2006.

STATEMENT OF THE CASE[1]

This is an attorneys' fee case, which came about because the Levys were prevented from putting on their case in the trial court by a biased judge pro tempore brought in at the last minute to try the case when the assigned judge, who had set the trial date, said he was in the middle of another case. The Court of Appeals affirmed the dismissal but vacated an award of more than $140,000 in attorneys' fees and associated expenses to respondent William A. Englund (Englund) and remanded for hearing (App. 4). At the fee hearing, for which Englund and the trial court prevented the Levys from preparing, Englund's attorney Leon B. Silver, Esq. (Silver) put on Englund's original defense with his own testimony over the Levys' objections, and the same judge then

[1] The Memorandum Decision of the Arizona Court of Appeals (Decision) (App. 1-36) consists of sixty-nine numbered paragraphs ("¶"), of which ¶¶2-22, FACTUAL AND PROCEDURAL HISTORY (App. 2-10), presents an alternative statement of the case, containing numerous misstatements and omissions of material facts, based on the Findings of Fact, Conclusions of Law, and Judgment (Findings) (App. 39-58) entered by the lower court, which itself is based on the testimony of Leon B. Silver (Silver), attorney for respondent, who said that his testimony was not to show the truth of what he said, only to show his state of mind (App. 71-72).

signed a judgment presented in advance by Silver giving Englund nearly $300,000 in fees as sanctions, including fees explicitly denied by appellate courts (App. 57-58). The Court of Appeals affirmed the judgment but reduced the award by the approximately $80,000 in fees denied by appellate courts (App. 25, ¶50), but then awarded Englund nearly $20,000 as sanctions (App. 38) against the Levys for appealing (App. 33-35), leaving the door open for additional sanctions on remand (App. 36). The fundamental issue is whether the Levys were denied due process and equal protection in having their reputations ruined and in being forced to pay almost $300,000 in unjustified attorneys' fees and related expenses as sanctions for having the temerity to go to court.

1. Circumstances That Precipitated Lawsuit

The Levys are residents of Texas.[2] While living in Phoenix in 1959, they bought a five-acre horse ranch lot (Lot 9). They moved away from Arizona before developing Lot 9, but leased it in 1990 to their neighbors, Dennis and Yvonne Hilker, who operated a horse boarding business on their five-acre lot (Lot 10), which adjoins the east side of Lot 9. The Hilkers had been using Lot 9 to run their horses since 1987, but

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[2] Robert Levy is a retired lieutenant commander in the U.S. Navy and the author of *Principles of Solid State Physics* (Academic Press, 1968).

finally signed a lease to pay rent (App. 89). Nothing in the lease allows dumping, whether it be manure or anything else. In December, 1993, the Hilkers sold Lot 10 to respondent Englund, who took over the horse boarding operation (App. 3, ¶5).

The Hilkers had left an accumulation of miscellaneous debris, including vehicle bodies, construction debris, and household trash, but not observable manure on Lot 9. The Levys had discussed the need to remove those objects with the Hilkers when they visited Lot 9 in the spring of 1994; however, Englund also wanted to rent Lot 9 and indicated in lease negotiations that he would provide the clean-up, relieving the Hilkers of this obligation, because he could not use the property in the condition the Hilkers had left it. In July, 1994, the Levys again visited Lot 9, this time making a videotape record (which showed no accumulation of manure) as they drove around the property (App. 50, paragraph 32). A week later the Levys were nearly killed when the car in which they were driving was struck by a truck owned by Swift Transportation Company,[3] a client of the law firm representing respondent Englund, and they forgot about having made the videotape, which they later discovered, made a copy for Englund, and introduced as part of their summary judgment evidence.

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[3] Swift Transportation Co. was a defendant in a lawsuit filed by the Levys, *Levy et ux v. Swift Transportation Co., et al.*, 529 U.S. 1055, (2000) and *Levy et ux v. Swift Transportation Co., et al.*, 536 U.S. 959 (2002).

The Levys and Englund agreed on a low rate of rent in exchange for Englund's agreement to clean up the property. They entered into a lease agreement on August 1, 1994 to use the property through December 31, 1998, for $13,250, payable in monthly installments of $250, plus a portion of the annual taxes (App. 91-92). Englund fenced, gated, and locked the south side of the lot, the north and west sides having been fenced by the neighboring property owners (App. 42, paragraph 14). A pipe rail fence along the east side separated Englund's Lot 10 from the Levys' Lot 9, with a wide gate in the middle allowing vehicular access between the two lots. In November, 1997, the parties agreed to increase the monthly payment from $250.00 to $355.00 to cover increases in the annual taxes by equal monthly payments (App. 41, paragraph 10). The lease included a provision that the property be returned in "good order and condition" (App. 92). Both parties agree that the property was not delivered to Englund in 1994 in good order and condition.

In November 1998, Englund sent the Levys a proposed addendum for a lease renewal, which was less favorable to the Levys than the original lease (App. 41, paragraph 11). The Levys made a written counteroffer to which Englund made no response, prompting the Levys to send Englund a letter dated December 15, 1998, advising him that if they heard nothing further from him, they would assume he was continuing to use the property after December 31, 1998 (App. 41, paragraph 13).

Englund made no direct response to this letter, but on January 12, 1999, the Levys received a $355.00 check from him dated January 3, 1999 – the same amount of monthly rent Englund had been paying during the previous year pursuant to their agreement (App. 42, paragraph 16). The Levys believed this payment to be Englund's intention to continue renting the property at the same rate. Then, on February 16, 1999, the Levys received another check from Englund for $313.64 (App. 42, paragraph 17). At that point they realized that Englund's two payments added up to the unpaid taxes (App. 42, paragraph 18). The Levys visited the property in March, 1999, and observed that Englund's lock was still on the gate and sent him a certified letter requesting that his rent be brought up to date. They visited the lot periodically after that and always observed Englund's lock still on the gate. The Levys continued to send monthly account balance statements to Englund through January 2001, when they contacted an attorney, who sent a letter to Englund demanding payment, to which he never responded (compare App. 42, paragraphs 16-19). In June, 2001, Ms. Donna Cook, an inspector for the City of Phoenix who had received a complaint about weeds growing on Lot 9,[4] was advised by the Levys that Englund controlled the property. She observed Englund's lock on the gate and contacted Englund, who said he no longer leased the

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[4] At the arbitration hearing on Feb. 1, 2002, Englund's daughter admitted having made the complaint to the City.

property. When she and Robert Levy met at the property on July 13, 2001, they both observed that the lock was gone. Ms. Cook secured the gate with one of her locks. Because the front gate was padlocked until June 2001 with Englund's lock, the only access to Lot 9 was from Englund's property, Lot 10.

In September, 2001, Robert Levy, Phyllis Levy, and their daughter Carolyn cleared the weeds from Lot 9 as required by the City of Phoenix. They saw huge piles of manure, much of it fresh and smelly, directly west of the gate between Lot 9 and Lot 10. They noticed that an area between the fence separating the two properties and the manure piles had already been cleared of weeds, with vehicle tracks in the dirt. They made videotape of the property including the manure piles, which they later introduced as part of their summary judgment evidence. The miscellaneous vehicle bodies and other metal objects were still on the property.

2. Proceedings Through Dismissal Of Case.

The Levys filed their original complaint on July 13, 2001, alleging breach of contract claims for unpaid rent of $16,500 by Englund from January 1, 1999, through June 30, 2001, at a monthly rate of $550.00, based on the Levys' letter to Englund dated December 15, 1998. The case was assigned for arbitration because the original complaint claimed less than $50,000 in controversy.

At the arbitration hearing held February 1, 2002, Englund represented he had receipts showing a commercial waste company had regularly removed the manure generated in his horse-boarding operation, but he failed to produce them. Following the Levys' appeal to the Superior Court, Englund's attorneys spent numerous hours fighting the Levys' request to produce the alleged receipts. The Superior Court, Judge J. Kenneth Mangum presiding, granted the Levys' motion to compel and ordered Englund to produce the receipts. Had the Levys been allowed to present their case, they would have shown that the receipts Englund thereafter produced were not for removal of manure (compare App. 49, subparagraph c.).

The arbitrator awarded no damages to the Levys and ruled the parties should bear their own costs. Following the arbitration, in or about March, 2002, Englund offered to buy Lot 9 from the Levys for $300,000 (see App. 40, paragraph 3), which the Levys declined.

Judge Mangum originally set a trial date for September, 2002, but postponed it to December 17, 2002, after his calendar had been transferred to Judge Robert D. Myers. Not counting the arbitrator, this case has had eight judges. It was assigned initially to Judge Mangum in July 2001. He retained jurisdiction through the arbitration, the appeal, the amended complaint and motions to compel production, until July, 2002, when his calendar was given to Judge Myers. When Judge Myers recused himself in

December, the case was assigned to Judge Gary E. Donahoe. In June, 2003, Judge Donahoe's calendar was assigned to Judge Thomas Dunevant. When the Levys exercised their right to change of judge, the case went to Judge Robert L. Gottsfield, who transferred it to pro tem Judge Patrick E. Eldridge, on the trial date, November 19, 2003, where it has remained ever since, even though Judge Gottsfield remained the assigned judge until his calendar was transferred to Judge Peter Swann, who then became the assigned judge until his calendar was assigned to Judge L. Grant.

At the pretrial conference on December 5, 2002, Mr. Levy asked Judge Myers if he would permit Mr. Levy to testify in a narrative fashion from notes. Judge Myers indicated he would allow this only if there was no objection. Englund failed to object during this or any other pre-trial conference or proceeding. Judge Myers urged the parties to settle the case before trial and he set an additional pre-trial conference the following week. Immediately following the hearing, Englund's attorney Silver warned Robert Levy that if he did not settle by dropping his case, he would be subject to $30,000 in attorneys' fees. He further warned Levy that he could not present his evidence of false documents regarding dumping manure by Englund to the jury. Silver later testified falsely that that conversation consisted instead of Robert Levy telling Silver he would make the case as expensive as possible for Englund (App. 17, ¶35).

Silver's testimony is summarized in the Findings (App. 44, paragraph 27).

Both sides filed motions for summary judgment on June 23, 2003, and Judge Gottsfield held telephonic hearings on these motions beginning on August 28, 2003. The Levys moved for partial summary judgment on the ground that no issue of disputed fact existed as to whether Englund owed rent for January and the first half of February, 1999. Englund moved for summary judgment on the alleged grounds that the property damage claim was barred by the statute of limitations; the contract did not require that he return property in any better condition than it was received; and that he did not use the property after expiration of the lease.

Throughout the litigation, Englund's attorney Silver repeatedly sought sanctions from the Levys. Later he claimed that the Levys had unreasonably increased his workload by their litigation tactics, which actually were primarily in response to his attacks. At no time did any of the judges allow sanctions against the Levys. Silver has consistently engaged in the abusive tactics of which he accuses the Levys.

The Levys submitted extensive evidence for the summary judgment proceedings indicating that Englund used the Levys' property to dump the manure generated in his horse boarding operation and continued to use it until at least September, 2001, including 1) videotape of the property from July 14,

1994 (App. 50, paragraph 32), 2) their own testimony, 3) Declaration of Laura Palmer, 4) Declaration of Jim Wenger (App. 81-83), 5) videotape of fresh manure September, 2001, 6) failure of receipts produced by Englund to show hauling away of manure (App. 49, subparagraph c.), and 7) declaration of Donna Cook, Phoenix City inspector.

From long-distance telephone conversations in July, 2003, the Levys obtained a Declaration from professional horse trainer Jim Wenger testifying that he saw manure being dumped from tractors and wheelbarrows from Englund's property onto Lot 9 continually from 1994 until at least 2000 (App. 82, paragraphs 7-9). Englund's attorney Silver then personally visited Mr. Wenger and got him to sign two more Declarations, the first in August, 2003 (App. 84-85) to prepare for his Reply in Support of Motion for Summary Judgment, and another on December 30, 2003 (App. 86-88), after the case had been dismissed, to support his exorbitant claims for attorneys' fees. A reading of these three Declarations shows how Silver's "lawyering" as he put it, amounts to witness tampering (App. 81-88). See the Levys' Amended Motion for New Trial (App. 75-77). Silver engaged in similar tactics with the Levys' other witnesses, including Laura Palmer Manos, Brad Drenning, and Glen Ghormley (App. 46-49), except that he was unable to obtain affidavits from them.

At the August 28 hearing Judge Gottsfield set the final pre-trial conference pursuant to Rule 16(d), Arizona Rules of Civil Procedure, for November 7,

2003, and the trial date for November 12, 2003. At the final hearing on the summary judgment motions on October 8, 2003, Judge Gottsfield denied both summary judgment motions, indicating that fact issues were present. At hearing October 30, Judge Gottsfield advised the parties that he had a conflict and would be unable to conduct the trial on November 12. On November 7, 2003, Judge Gottsfield ruled on various pending motions, including the Levys' motions in limine (which the court granted in part and denied in part) and Englund's notice of non-party at fault, where he was trying to blame everything on the Hilkers, who could no longer be sued (which the court denied). Because of the time consumed on the pending motions, no time remained to complete pre-trial conference issues as envisioned by Rule 16(d), such as the manner of testimony. Instead of continuing the Rule 16(d) conference and the trial until he could conduct it, he brought in a retired lawyer, pro tem judge Patrick E. Eldridge, a former Deputy Maricopa County Attorney,[5] to conduct the trial on November 19, 2003 and any post-trial motions, although Judge Gottsfield remained the assigned judge.

On November 12, 2003, the Levys fax-filed and served their Motion to Continue Trial or Order Follow-up Pre-Trial Conference, to allow Judge

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[5] The Levys sued the County of Maricopa in 2000 (*Levy v. County of Maricopa*, TX2000-000380 (2003)) and obtained a reduction of the valuation of Lot 9 (App. 45, paragraph 30).

Gottsfield to rule on pre-trial issues, including narrative testimony by the Levys. Englund's response was to request that the court dismiss the Levys' complaint and award him costs and attorneys' fees, without addressing the question of the manner of the Levys' testimony. Judge Gottsfield summarily denied the Levys' motion.

On the trial date, for the first time in the action, Englund objected to Mr. Levy's proposed narrative testimony, contending that Judge Robert Myers had ruled on December 5, 2002, that Mr. Levy was required to obtain a stipulation from Englund's attorney to testify in the narrative. Despite the absence of such ruling, pro tem judge Eldridge sustained this objection, holding that Judge Myers' alleged ruling was "the law of the case."

Notwithstanding this erroneous ruling, Mr. Levy still tried to put on his case, indicating that he was prepared to proceed with trial by asking himself questions. For a second time, Judge Eldridge thwarted his attempt, refusing to allow Mr. Levy to ask himself questions. On top of this, the court compounded the injustice by ordering co-plaintiff Phyllis Levy, a non-lawyer, to conduct the direct examination of Mr. Levy and refused to allow the Levys to consult with each other or to take a break for lunch (it was close to noon). Having made the above erroneous rulings, the court then demanded to know whether Mr. Levy was ready to proceed, at which time Mr. Levy indicated he was not (because he had

planned to testify that afternoon). The court never asked Phyllis Levy whether she was ready to proceed.

Englund then orally moved that the case be dismissed. Judge Eldridge immediately granted his motion without allowing either Mr. or Mrs. Levy an opportunity to respond to the motion. Notwithstanding the lack of argument on the motion to dismiss, the court issued a minute entry the following day, November 20, 2003, stating that oral argument did take place on defendant's motion to dismiss.

On December 5, 2003, the Levys filed an application to remove Judge Eldridge for cause. Englund's response, filed December 15, 2003, included an injection, for the first time, of the Levys' unrelated lawsuit against Swift Transportation Company, including copies of court documents, into this case (Compare App. 8, ¶17). The Levys' application was denied, and they did not assign the denial as error in their appeal of the judgment, which awarded Englund a total of $118,566.97 in attorneys' fees, costs, and non-taxable litigation expenses (essentially everything that he requested).

3. The First Appeal *(Levy I)*

The Levys appealed (App. 2, Footnote 1), arguing that the superior court erred 1) in determining that a pro se litigant was foreclosed from providing his own testimony unless elicited by some other party, 2) in dismissing the Levys' action without giving either Robert Levy or Phyllis Levy an opportunity to oppose

Englund's motion to dismiss, and 3) that the attorneys' fees and associated expenses were excessive and padded and awarded without a hearing. During the appellate litigation, Judge Eldridge awarded Englund three supplemental judgments for additional fees, costs and expenses, bringing the total to $141,035.74.[6] In an unpublished Memorandum Decision entered March 10, 2005 and amended May 23, 2005 *(Levy I)*, the Court of Appeals affirmed the dismissal of the Levys' case but vacated the award of fees and costs, and remanded to the superior court for a hearing, holding that Englund had failed to substantiate the fees, noting that the award also included items that were disallowed by statute unless they were awarded as sanctions, and since the Levys' punitive damage and bad faith claims had been dismissed well in advance of trial and prior to the expenditure of fourteen working days in trial preparation for a projected 3 to 4 day trial (compare App. 8, ¶16 and App. 44, paragraph 26).[7]

Both sides filed petitions for review in the Arizona Supreme Court, and both were denied,

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[6] Of which the Levys paid $16,188.79 to satisfy the first supplemental judgment, against which they neglected to file a separate Notice of Appeal.

[7] The figure $1 million came about solely because Robert Levy said "Yes" when Silver asked if he would be happy if the jury awarded him $1,000,000 (App. 8, ¶16). Did Silver really believe he was litigating a million dollar case from that? The absurdity of Englund's case, the Findings, and the Decision is starkly illustrated by this contention.

including Englund's request for attorneys' fees in that court.

4. The Second Appeal *(Levy II)*

Following the mandate from the Court of Appeals, the Levys applied for a peremptory change of judge and also for a change of judge for cause, to have Judge Eldridge removed from the case. The presiding judge of the superior court, the Honorable Anna Baca, ordered the assigned judge, the Honorable Peter Swann, (who had taken over from Judge Gottsfield on rotation) to rule on the peremptory challenge, and she herself ruled on the challenge for cause,[8] both of which were denied. At a status conference with Judge Swann on July 27, 2006, the Levys asked Judge Swann to preside over the attorneys' fee hearing; Silver objected adamantly, and Judge Swann left the case with pro tem Judge Eldridge. Judge Swann ruled that the attorneys' fee hearing would be based on the prior applications and supplemental judgments and that any additional application for fees would be appropriate only if the Levys failed to prevail at the hearing. Judge Swann gave the Levys leave to file a special action in the Court of Appeals contesting the denial of their

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[8] The subject matter of Paragraphs 30 (App. 45) and 38 (App. 54) of the Findings relates primarily to the allegations of bias and interest on the part of Judge Eldridge. Since the motion for change of judge for cause was denied expeditiously by Judge Baca, Silver could not have spent much time on these issues.

peremptory challenge. The Court of Appeals accepted jurisdiction but affirmed the denial. It denied Englund's request for attorneys' fees for responding to the special action petition. The Levys appealed unsuccessfully to the Arizona Supreme Court, which again denied Englund's request for attorneys' fees.

Judge Eldridge set a scheduling conference for September 11, 2006, which he vacated ex parte and set a hearing date for November 7, 2006 on motion from Englund, who agreed to respond to the Levys' discovery requests within ten days of service. The Levys served discovery requests immediately requesting response by September 22, 2006, but Englund refused to comply; the Levys did not receive his incomplete response until October 17, 2006, leaving them insufficient time to analyze the more than 200 pages of material. Judge Eldridge denied the Levys' motions to compel and to continue the hearing date. On October 24, 2006, the Levys filed their supplemental brief in opposition to defendant's demand for attorneys' fees and costs, including an affidavit of economic hardship.

On Friday, November 3, 2006, Englund's attorney filed his fourth application for attorneys' fees and associated expenses, totaling more than $250,000, this time in sanctions, from which, according to Rules 6(a), 6(e), and 7.1(a), Ariz.R.Civ.P., the Levys should have had until November 22, 2006 to respond, before a hearing could even be scheduled, much less held.

Nevertheless, the fee hearing began at 1:30 p.m. on November 7, 2006 in Judge Swann's courtroom, Judge Eldridge presiding. Silver gave the Levys a copy of his proposed Findings of Fact, Conclusions of Law, and Judgment (Findings), which had already been served on Judge Eldridge. Judge Eldridge announced that he had received and read that submission. Silver also gave the Levys copies of the exhibits he intended to use in his presentation. At the outset, the Levys objected to the exhibits and the proposed Findings, pointing out that Englund was going to try the underlying case. Silver said that his testimony was not intended to prove the truth of what he said, but only to show how he needed to spend his time. Judge Eldridge overruled the Levys' objections. But even though Silver said that his testimony was not being offered for the truth of the matters asserted, the only basis for sanctions against the Levys is contained in that testimony, which forms the basis for the Findings that Silver prepared for Judge Eldridge to sign and for the Factual and Procedural History in the Decision (App. 2-10, ¶¶2-22). Silver laid out his version of the case, relating what witnesses Laura Palmer, Jim Wenger, Glen Ghormley, Brad Drenning, and Brent Bowles had allegedly told him, but not calling any witnesses except other attorneys. His expert witness Mr. Mark Harrison, admitted under cross-examination that he had not read the filings in the case; he merely counted them; he also admitted that judges in Arizona have a responsibility to protect unrepresented parties from aggressive tactics of opposing counsel. Englund's

presentation ended at 5:00 p.m., at which time Judge Eldridge said the hearing would have to be continued until the following month because the courtroom would not be available the next day. Silver suggested having it the next day in his office, to which the Levys objected, but acquiesced when no alternatives were presented. The following morning, when the hearing began at 9:40 in counsel's office, the Levys again objected, but were overruled. Mr. Levy began his cross-examination of Silver but was unable to finish it when Judge Eldridge advised the parties that he had to be out by 11:30. After Mr. Levy began his testimony, Silver suggested that he could complete it in writing. Judge Eldridge gave the Levys until November 15 to file their testimony. Thus the hearing consisted of three parts, a courtroom session on the afternoon of November 7 (Hearing I), a two-hour conference room session on the morning of November 8 (Hearing II), and filed on November 15, the Levys' twenty-page Objection to Defendant's Notice of Proposed Findings of Fact, Conclusions of law, and Form of Judgment, With Argument and Testimony (Hearing III) (App. 63-64) (ignored by Judge Eldridge since the Findings had already been submitted) and trivialized by the Court of Appeals (App. 10, ¶21, see App. 67, Footnote 2).

The Levys also filed a response to Englund's 4th application for fees on November 20; but on November 21, Judge Eldridge entered a signed verbatim copy of the proposed Findings (App. 39-58) submitted to him by Silver, imposing sanctions totaling

$279,901 against the Levys (App. 57-58). He exonerated the Levys' supersedeas bonds totaling $201,452.10 to Silver, and the Levys then sent Silver a check for $78,448.90 for the balance due on the judgment.

On December 5, 2006, the Levys filed their motion for new trial, followed by their Amended motion for new trial on January 2, 2007 (App. 62-80), alleging irregularities in the proceedings of the court which deprived the Levys of a fair trial and other errors. Judge Eldridge denied their amended motion without comment (App. 59-60) and entered a supplemental judgment granting Englund an additional $12,339.48[9] in attorneys' fees as sanctions over the Levys' objections, which the Levys paid by check to Mr. Silver. The Levys appealed the Findings and the supplemental judgment, and on June 15, 2007, filed their opening brief, alleging that sanctions were not allowed as a matter of law, that the evidence in support of sanctions is not credible or admissible, that the trial court failed to sanction Englund for witness tampering and other abuses, that attorneys' fees are not allowed as a matter of law, that the lower court denied the Levys adequate preparation for the hearing, that the fee hearing was improperly conducted by Judge Eldridge, that the lower court failed to give them a new trial and failed to remove Judge

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[9] Thereby bringing the total to $308,429.27 paid by the Levys to Englund, including the first supplemental judgment of $16,188.79 paid in July, 2004 (see Footnote 6).

Eldridge from the case for cause. Briefing was complete with the filing of the Levys' Reply Brief on September 14, 2007.

Nearly two years later, on July 23, 2009, the Court of Appeals entered a thirty-five page unpublished and uncitable Memorandum Decision (Decision) (App. 1-36), affirming the Findings but reducing the award of attorneys' fees by $79,759.39, which Englund had incurred in the appellate courts (App. 25, ¶50). It then awarded Englund attorneys' fees as sanctions against the Levys for bringing their appeal (App. 35, ¶68), totaling $19,349.50 in a subsequent order over the Levys' objections, including the fact that the fee request was untimely filed (App. 38), and it gave the lower court a green light to award additional sanctions on remand (App. 35-36, ¶69). Both parties' motions for reconsideration were denied (App. 37-38). Both parties' petitions for review in the Arizona Supreme Court were denied on January 5, 2010 (App. 61).

REASONS FOR GRANTING THE WRIT

If this case had been in federal court, it would have qualified under Sup.Ct.R. 10(a), where a court of appeals, in this case the Arizona Court of Appeals in its Decision (App. 1-36) "has so far departed from the accepted and usual course of judicial proceedings,. . . . as to call for an exercise of this Court's supervisory power." It has also sanctioned such a departure by the

Superior Court of Maricopa County, in its Findings (App. 39-58) entered by pro tem Judge Patrick Eldridge, to such an extent that the Levys have been deprived of protections under the due process and equal protection clauses of the Fourteenth Amendment. In many ways the excessiveness of the Decision (e.g. ¶21,¶61,¶67)[10] and particularly the Findings (e.g. paragraphs 30, 38, 47) speaks for itself.

I. The Petition Should Be Granted Because the Memorandum Decision of the Arizona Court of Appeals (Decision) If Published Would Change the Law in Arizona, Thereby Denying the Levys the Protection of the Equal Protection Clause of the Fourteenth Amendment.

The cover page of the Decision (App. 1) states: "This decision does not create legal precedent and may not be cited except as authorized by applicable rules." Several holdings of the Decision, had it been published, would create legal precedent, but because it is unpublished, such holdings apply only to the Levys and not to any other litigants in Arizona courts.

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[10] The Court of Appeals did apply a fair and thorough analysis in paragraphs 40-50 (App. 20-25), reversing an award of attorneys' fees denied by the appellate courts, an approach which unfortunately it failed to follow throughout its Decision.

1. In the trial court the Levys requested a change of judge for cause, citing reasons why pro tem Judge Eldridge should be replaced. After their request was denied, they assigned the denial as error in their appeal. Englund's Answer asserted that the only relief available was via special action, the time for which had expired, and criticized the Levys for even raising the issue. The Levys pointed out in their Reply that Englund's contention was frivolous, since the controlling case from the Arizona Supreme Court, *Taliaferro v. Taliaferro,* 921 P.2d 21, 23-24 (Ariz. 1996) specifically exempted challenges for cause from the special action requirement. For some inexplicable reason, the Court of Appeals adopted Englund's erroneous contention, saying, at ¶62 (App. 32), "We see no reason why the same requirement should not apply to attempts to review notices of change of judge for cause,"[11] and refused to review this error, with a cursory rejection (App. 32-33). The rejection constituted part of the reason for the Court of Appeals to sanction the Levys for bringing their appeal (App. 34). This holding establishes new law by overruling *Taliaferro*, but because "the Decision does not create precedent," the new law applies only to the Levys, thereby violating the Levys' equal protection rights under the Fourteenth Amendment.

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[11] Citing an irrelevant case, *Lopez v. Kearney ex rel. County of Pima*, 213 P.3d 282, 283 (2009).

2. The Decision disregarded established law in Arizona that once a judgment is entered, another trial judge may not overrule a decision of the trial judge in the same case (App. 13). The Supreme Court of Arizona in *Lemons v. Superior Court,* 687 P.2d 1257, 1259 (Ariz. 1984) established this principle, which has been followed in subsequent cases, e.g. *Bogard v. Cannon & Wendt Elec. Co., Inc.,* 212 P.3d 17, 25 (2009). Notwithstanding Englund's numerous requests for sanctions throughout this litigation, all such requests were denied prior to the final judgment entered February 2, 2004. Yet the new trial judge (pro tem Judge Eldridge) had no hesitation in signing the Findings (App. 39-58) that Englund's attorney presented to him, leveling sanctions amounting to close to $300,000 in attorneys' fees and associated other charges against the Levys, including a $5000 statutory sanction (App. 57). The Court of Appeals ratified this judgment on grounds that the Levys failed to raise the issue in the trial court (App. 13, ¶27) as to two out of seven rulings, when in fact they did, as they documented in their motion for reconsideration, where they showed the issue was raised in Hearing III and in their Amended Motion for New Trial (App. 78) (In their cross-petition for review in the Arizona Supreme Court, they also cited *Barrio v. San Manuel Div. Hosp., Magma Copper*, 692 P.2d 280, 283 (Ariz. 1984), showing that the supreme court may consider issues not raised in the trial court.) But because the Decision is unpublished and cannot be cited, this result will never see the light of day, and

only the Levys will have been damaged, thereby denying them equal protection of the laws.

3. The Decision created legal precedent in Arizona by awarding Englund attorneys' fees on appeal as sanctions (App. 33-35, ¶¶65-68) against a prevailing party (to the tune of approximately $80,000 (App. 20-25, ¶¶40-50). The Levys could find no authority in Arizona (or anywhere else) for such a holding, but because of the unpublished Decision, it applies only to them, thereby denying them the equal protection of the laws.

4. The Decision disregarded established law in Arizona that a court "may adopt proposed findings that the parties submit, but **only** if those findings are consistent with the ones that it reaches independently after properly considering the facts," *Elliott v. Elliott,* 796 P.2d 930, 936 (1990) (Emphasis supplied) (App. 19, ¶38). Englund's attorney presented the proposed findings of fact, conclusions of law, and judgment, which included sanctions against plaintiffs for alleged abuses, to Judge Eldridge prior to the fee hearing. Judge Eldridge signed the proposed findings verbatim, even with a flagrant typographical error (referring to "plaintiff" instead of defendant) (App. 58)[12] in plain view of where the judge's signature appears. Judge Eldridge's signing off on the award of fees denied by the appellate courts (App. 57,

[12] An error he later had to correct in an amendment to the judgment (App. 60).

paragraph 47) is also evidence of his failure to make an independent determination. Thus the Decision overruled *Elliott*, but only the Levys are subjected to the ruling, thereby denying them equal protection of the laws.

II. The Petition Should Be Granted Because the Decision Affirmed the Trial Court's Denial of the Levys' Application For a Change of Judge For Cause and Their Amended Motion for New Trial, Thereby Denying Them Due Process Under the Fourteenth Amendment in the Preparation For and Conduct of the Attorneys' Fee Hearing.

"A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133 (1955). "Necessarily included in the right to a fair trial is the right to have the trial presided over by a judge who is completely impartial and free of bias or prejudice," *State v. Neil*, 425 P.2d 842, 844 (1967). By refusing to consider the merits of the Levys' request for change of judge for cause, the Court of Appeals left in place a judge pro tempore who has twice been reversed by the Court of Appeals, who along with counsel for Englund, also a judge pro tempore, has represented the Levys' adversary in court, and whose rulings show bias and favoritism from the moment he took over the case.

As set forth in the Statement of the Case (supra), Judge Eldridge denied the Levys an adequate opportunity to prepare for the hearing (See also Amended Motion for New Trial, (App. 64-69). Moreover, the Decision's affirmation of Judge Eldridge's conduct of the hearing depends primarily on misstatements and omissions of fact (App. 29-31). In ¶58, it was not the Levys who requested that the hearing the following day be held in Silver's office and limited to one-half day; it was Silver, to which the Levys objected and sought to have it in the courtroom on a different day but acquiesced when informed no courtroom was available. And it was the judge who limited it to one-half day (later he further limited it to two hours). In ¶58, it was not until after the Levys had to prematurely end Silver's cross-examination and start their own testimony, based on the time constraint set by Judge Eldridge, that Silver suddenly offered to allow them to finish their testimony in writing. At ¶59 the end of the cross-examination is taken woefully out of context. The Decision ignored the detailed analysis in the Levys' amended motion for new trial (App. 64-69). Judge Eldridge even told Robert Levy that he could accomplish the task of cross-examining Silver with his own testimony or in closing argument instead of cross examination (App. 66, paragraph 2). By allocating a single afternoon of courtroom time for completion of the hearing, he forced the Levys to conduct their part of the hearing in the office of opposing counsel. They were effectively prevented from having their materials with them. The Decision's conclusion at Footnote 11 (App. 30), that " . . . it is not the superior court's fault if the

Levys were unprepared for the second day of the hearing" is erroneous. *It was in fact the superior court's fault*, for failing to provide a courtroom for the Levys. It was abuse of discretion to plan for a single afternoon of courtroom time, particularly since pro tem Judge Eldridge has no courtroom of his own. It was incumbent on the judge to get sufficient courtroom time, especially after denying the Levys' motion to continue. *That was his job.* He also made sure that if the hearing spilled over to the next day, he would again not allow enough time, by not leaving the afternoon free. Judge Eldridge's pro tempore status and his conduct have contributed to the creation of a two-tier system of justice in the Maricopa County Superior Court. Had he been a regular judge of the Superior Court, there would have been no problems with availability of a courtroom, with sufficient time for both sides to present their cases, nor would the judge have been unfamiliar, as Judge Eldridge obviously was and is, with the practice, outlined by Mark Harrison, of protecting unrepresented parties from attack by opposing lawyers. Silver's status as another pro tem judge of the Superior Court also contributes to defeating the purpose of an impartial judicial system. The use of a pro tem judge to facilitate the fleecing of vulnerable individuals in Arizona has recently received media attention in Phoenix.[13] The Levys have been denied due process under the Fourteenth Amendment.

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[13] See articles by Laurie Roberts: *Judge: probate attorneys were justified in taking $473,000 from old lady*, azcentral.com,

(Continued on following page)

III. The Petition Should Be Granted Because the Decision's Imposition of Sanctions Against the Levys For Filing Their Appeal Constitutes a Violation of Due Process Under the Fourteenth Amendment.

A State is not required to provide a means of appeal to meet the demands of due process, but when it does, it cannot put limitations which are discriminatory, arbitrary, and totally unrelated to any possible State purpose, *Compton v. Naylor*, 392 F.Supp. 575, 578 (N.D.Tex. 1975); *Oppenheimer v. Roth*, 468 F.2d 901, 902 (C.A.Cal. 1972), citing *National Union of Marine Cooks v. Arnold*, 348 U.S. 37 (1954). Imposing sanctions on a prevailing party for filing an appeal amounts to a fine or punishment and constitutes denial of due process.

The Findings which Englund's lawyer presented to Judge Eldridge gave him everything, including attorneys' fees that had been explicitly denied by the appellate courts. The Levys assigned these awards as error, and the Court of Appeals agreed, reversing approximately $80,000 of the award (App. 20-25). Then, it turned around and sanctioned the Levys for having the temerity to appeal (App. 35, ¶68), awarding Englund nearly $20,000 in attorneys' fees as sanctions, (even after Englund failed to timely file his application, App. 38), citing cases that fail to

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March 23, 2010, and *Old Lady goes to federal court (and now she has company)*, The Arizona Republic, January 30, 2010.

support its position (App. 34) but actually support the argument that it is Englund, not the Levys who should have been sanctioned, for making claims which he knew were frivolous (App. 33-35). See *Standage v. Jaburg & Wilk, P.C.*, 866 P.2d 889, 895 (1993). It even gave the lower court a green light to award additional sanctions on remand (App. 36).

Furthermore, in affirming Judge Eldridge's denial of the Levys' amended motion for new trial (App. 2, 35), which awarded additional sanctions of $12,339.48, the appeals court affirmed the additional attorneys' fees awarded to Englund for opposing the Levys' contention that fees denied by appellate courts could not be collected. Thus, the Levys had to pay twice for prevailing, first in the lower court and then in the Court of Appeals. These results constitute denial of due process under the Fourteenth Amendment.

IV. The Petition Should Be Granted Because the Decision Relied on Numerous Misstatements and Omissions of Material Fact, Turned a Blind Eye to Witness Tampering by Englund's Attorney, and Denied the Levys' Motions to Supplement the Record, to Refer to Other Appeals Court Cases, and For Oral Argument, Thereby Denying Them Due Process Under the Fourteenth Amendment.

1. Paragraphs ¶¶2-22 of the Decision (App. 2-10), the Factual and Procedural History of the case as recited by the Court of Appeals, is replete with

misstatements and omissions of material fact (see Statement of the Case, supra), making the Levys look irresponsible at best and ruining their personal reputations (App. 10, ¶21, see also App. 67, Footnote 2).[14] The Court of Appeals relied on this recitation to affirm the sanctions leveled against the Levys by Judge Eldridge and to impose sanctions of its own on appeal (¶¶66-68). Perhaps the most egregious of these misstatements is the affirmation of Silver's false testimony that Robert Levy said that he would make the case as expensive as possible and thus force Englund into paying the Levys' money to settle the case (see App. 15, ¶31 and App. 17, ¶35; see also paragraph 27 (App. 44) of the trial court's findings of fact). Mr. Levy denied these accusations in his testimony at the fee hearing (App. 75). In fact, that conversation consisted of Silver trying to extort the Levys' case away from them by threatening them with having to pay attorneys' fees if they didn't drop their case and warning that they could not show the jury their evidence that Englund had produced false documentary evidence of dumping manure (Statement of the Case, supra).

2. The Levys pointed out evidence that Englund's attorney Silver engaged in witness tampering in convincing the Levys' witnesses to recant their statements, but the Court of Appeals paid no attention to

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[14] The recited facts are primarily from Silver's testimony (App. 6-9, ¶¶13-18), which he said was offered, not to prove the truth of what he said, only to show his state of mind.

these allegations, implying that it was the Levys who misled their witnesses (App. 18-19, Footnote 4; App. 31-32, ¶61). Examples of this "lawyering" as Silver calls it, are set forth in the affidavits he obtained from Jim Wenger (App. 84-88) to counter the affidavit the Levys obtained (App. 81-83), as discussed in the Levys' Amended Motion for New Trial (App. 75-76). The Wenger affidavits (App. 81-88) speak for themselves. The fact that Silver actually included his two Wenger affidavits in his court filings shows how confident he was that he could get away with anything, including employing the abusive tactics of which he accused the Levys, such as injecting the *Swift* case into the proceedings and then accusing the Levys of doing so. (App. 8, ¶17).

3. After filing their notice of appeal, the Levys filed a motion to allow them to supplement the record on appeal with exhibits that had been returned to them when the underlying case was dismissed. This motion was denied. They filed a motion to permit them to refer to the briefs in the prior appeal *(Levy I)*, which was also denied. They filed a timely application for oral argument which was denied.

These actions by the Court of Appeals contribute to the denial of due process under the Fourteenth Amendment.

CONCLUSION

The State of Arizona has in effect established a two-tier system of justice, one where the rules are

followed and one which has no rules. The use of pro tem judges in the trial court together with unpublished opinions in the appeals court is a combination with sinister consequences for the administration of justice and public confidence therein that cannot be ignored or glossed over. In this particular case it was used to fleece elderly non-resident property owners, but there are no limits to the damage it can do as long as it remains unchecked. Only this Court can now deal with this important and compelling issue. Accordingly, the Levys respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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